

Delhi High Court

Rana Kapoor vs Directorate Of Enforcement on 25 November, 2022

Neutral Citation Number: 2022/DHC/005170

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* IN THE HIGH COURT OF DELHI AT NEWDELHI

Reserved on: 31st October

Decided on: 25th November

+ BAIL APPLN.559/2022
RANA KAPOOR

Through: Mr. Vikas Pahwa, Senior Advocate with Ms. Stuti Gujral, Ms. Priti Verma, Mr. Shaurya Singh, Mr. Prabhav Rali and Mr. Abhishek Pati, Advocates.

V

DIRECTORATE OF ENFORCEMENT Respondent

Through: Mr. Anupam S. Sharma, Special counsel, ED with Mr. Prakarsh Airan, and Ms. Harpreet Kalsi, Mr. Ripudaman Sharma, Mr. Abhishek Batra, Mr. Nishant Chaudhary and Mr. Anurag Verma, Advocates.

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CORAM:

HON'BLE MR. JUSTICE SUDHIR KUMAR JAIN

JUDGMENT

1. The present bail application is filed under section 439 of the Code of Criminal Procedure, 1973 (herein after referred to as "the Code") seeking bail in C.C.no. ECIR/11/HIU/2021 dated 15.06.2021 titled Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 1 11:59:21 Neutral Citation Number: 2022/DHC/005170 Directorate of Enforcement V Gautam Thapar & others pending in the court of Special Judge (PC Act, CBI-02), Rouse Avenue District Court, New Delhi.

2. CBI registered FIR bearing RC No.2232021A0005 under sections 120B and 406, 420, 468, 471 IPC at P.S AC-V, Delhi on basis of complaint received from Ashish Vinod Joshi, Chief Vigilance Officer, Yes Bank Limited against M/s Oyster Build well Private Limited and its holding company M/s Avantha Reality Limited, its Directors/Promoters namely Raghubir Kumar Sharma, Shri Rajendra Kumar Mangal, Shri Tapsi Mahajan and Gautam Thapar and unknown officials of M/s Jhabua Power Investment Limited, unknown known officials of Power Power Limited, unknown

officials of M/s Avantha Holdings Ltd., unknown officials of M/s Avantha Power & Infrastructure Ltd. and unknown bank officials.

2.1 Thereafter respondent filed CC No. ECIR/11/HIU 2021 dated 15.06.2021 under sections 44 and 45 of Prevention of Money Laundering Act, 2002 (hereinafter referred to as "PMLA") for commission of offence of money laundering as defined under sections 3 and 4 of PMLA which is pending in the Court of Special Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 2 11:59:21 Neutral Citation Number: 2022/DHC/005170 Judge, PMLA, Rouse Avenue Courts. It is alleged in complaint that subsequent to the removal of Rana Kapoor i.e. the applicant from management of YES Bank on allegations of granting various credit facilities to several companies by not following the banking norms thereby causing huge amount of losses to the YES Bank in lieu of illegal gratification, various complaints have been filed against applicant and one such complaint relates to the credit facilities to the extent of Rs. 514.27 Cr extended to Oyster Buildwell Private Limited (OBPL) causing a wrongful loss of Rs. 466.51 Cr to the YES Bank.

The said complaint led to the registration of FIR bearing no.

RC2232021A0005 dated by CBI, Delhi under sections 120(B), 406, 420, 468 and 471 of IPC, 1860 against persons as mentioned hereinabove. It is alleged that above persons having committed criminal breach of trust, cheating, criminal conspiracy and forgery for diversion/misappropriation of the public money during the period from 2017 to 2019 and causing loss to the tune of Rs.466.51 crore to YES Bank.

2.2 It was observed that huge amounts of proceeds had been generated from the criminal activity related to the Scheduled Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 3 11:59:21 Neutral Citation Number: 2022/DHC/005170 Offences, therefore, investigation under PMLA was initiated to investigate possible money laundering and to trace the proceeds of crime. Accordingly Enforcement Case Information Record (ECIR) no. ECIR/11/HIU/2021 dated 15.06.2021 was recorded. During investigation it was revealed that Avantha Group and its three companies i.e. M/s Oyster Buildwell Pvt. Ltd. (OBPL), M/s Jhabua Power and Investments Limited (JPIL) and Jhabua Power Limited (JPL) were involved in the sham agreement for getting the credit facility from the Bank in pursuance of criminal conspiracy between the bank and Avantha Group. The applicant was not named as accused in FIR registered by CBI. The applicant stated to be interrogated by the respondent/ED and three statements of the applicant were recorded under section 50 of the PMLA. The applicant was not arrested during investigation. The concerned trial court vide order dated 09.10.2021 acting on the Complaint took cognizance of the offence under sections 3 and 4 PMLA and summoned 21 persons/entities including the applicant besides seven other ex-senior employees of Yes Bank to stand trial. The applicant was stated to be in custody at that time in Talaja Central Jail, Mumbai Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 4 11:59:21 Neutral Citation Number: 2022/DHC/005170 in any other case. The co-accused Gautam Thapar was stated to be taken into custody during investigation on 03.08.2021. The co-

accused filed a bail application under section 439 of the Code read with sections 45/46(1)/65 PMLA before Special Court which was dismissed by the Special Judge vide order dated 30.10.2021. The co-accused Gautam Thapar filed a bail application bearing no.

4185/2021 before this court and said bail application was dismissed vide order dated 02.03.2022.

3. The applicant on 09.11.2021 filed an application for grant of bail under section 439 of the Code read with sections 45, 46(1) and 65 PMLA. The applicant in bail application pleaded that he was not arrested during investigation and was available during investigation and has extended full cooperation in investigation besides other grounds. The respondent filed reply to bail application. The respondent also filed additional reply whereby objected to grant of bail on the basis that since the applicant had not "physically surrendered" to the Trial Court and as such applicant was not entitled to file bail application. It is reflecting from order dated 20.11.2021 passed by the court of Sh. Sanjeev Aggarwal, Special Judge (PC Act) Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 5 11:59:21 Neutral Citation Number: 2022/DHC/005170 CBI-02, Rouse Avenue Courts that the respondent pleaded for first production of the applicant to be considered "in the custody of the Court" and the applicant has to be produced in physical form due to reason that application was filed under section 439 of the Code. The applicant was produced before the trial court on 04.01.2022.

3.1 The court of Sh. Sanjeev Aggarwal, Special Judge (PC Act)(CBI)-02 Rouse Avenue District Court, New Delhi vide common order dated 20.01.2022 dismissed the bail application of the applicant but granted bail to all other individuals including the seven ex-senior YBL officials. The relevant portion of order dated 20.01.2022 is reproduced as under:-

71. From the above, it appears that Yes Bank under the leadership of Mr. Rana Kapoor wanted to take control over the CG Power shares which were already pledged with other lenders for doing this, Yes Bank entered into a sham and fraudulent loan agreement with the Group company of Avantha through agreements, which were made or were given a colour in such a manner so as to make transaction as a banking transaction. Prima facie on the instructions of Mr. Rana Kapoor, the employees of Yes Bank allegedly entered into two sham fraudulent O and M agreements executed between OBPL and JPIL and JPL and JPIL respectively.

Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 6 11:59:21 Neutral Citation Number: 2022/DHC/005170

72. Further it appears that sole purpose of the loan was to acquire the shares of CG Power for additional security which could not have been achieved, but for the sham structure, it also appears same was done in tandem with Mr. Gauram Thapar to generate proceeds to the tune of Rs. 500.11 Crores which were generated in this case due to the above acts of Mr. Rana Kapoor, the said

proceeds of the crime was layered into untainted business funds through companies controlled by Mr. Gautam Thapar and were utilized for repayments of existing loans of companies and meeting other business requirements. Layering was done by rotating the proceeds of crime through bank accounts of various companies

73. Since prima facie Mr. Rana Kapoor appears to be the controlling mind of the above fraudulent transaction along with one Mr. Gautam Thapar, as both were at the apex of corporate ladder qua Yes Bank and Avantha Group respectively, it also appears he was also one of the man beneficiary of this sham transaction. It is also apparent that he may be the man pulling the strings or the controlling mind or master mind or head controlling the present transaction prima facie, whereas the other accused persons arraigned in the present complaint at different levels of the corporate Pyramid may only have been working as hands, as they were all employees either of Avantha Group or Yes Bank, where they were working in different capacities.

74. During the course of the arguments, it has also been revealed that Mr. Rana Kapoor is wanted in one CBI case pertaining to DHFL, where the amount involved is Rs. 600 Crores approx. and one Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 7 11:59:21 Neutral Citation Number: 2022/DHC/005170 corresponding ED case of the same amount, it has also been revealed thathe is also wanted in another ED case of Macaktar of Rs. 200 Crores approx. and also one CBI case pertaining to Avantha Reality of Rs. 500 Crores as well as one more case pertaining to ED qua Cox and Kings, where he is stated to be on bail, therefore, this accused is having previous involvement in five different cases that too of huge magnitude.

It was also argued by ED during the course of arguments that various loans of huge magnitude sanctioned during the tenure of A-2 have turned into non performing assets (NPAs).

75. Since huge loss of public money / funds is involved in present case, it needs to be viewed seriously and has to be considered as grave offence(s) affecting the economy of the country as a whole and thereby causing serious threat to the financial health of the country and since economic offences constitute a class apart, therefore, it needs to be visited with a different approach in the matter of bail as economic offence(s) have deep rooted conspiracies involving huge loss of public funds. Further money laundering gives oxygen to organized crime by use of financial vehicles for transporting dirty / tainted money.

76. Now adverting to the arguments of Ld. Defence Counsel that the accused meets the triple test i.e. there is no possibility of tempering of evidence or influencing the witnesses or fleeing from justice. With regard to the tempering of evidence, Ld. Special PP for ED has argued that Mr. Rana Kapoor was the CEO and MD of Yes Bank, so there is a complete possibility of tempering of evidence by him, whereas Ld. Defence Counsel has Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 8 11:59:21 Neutral Citation Number: 2022/DHC/005170 vehemently controverted the same saying all the evidence is documentary in nature, which cannot be tinkered by accused. The said argument is not without any merit, as Mr. Rana Kapoor was in pole position in

the said Yes Bank and was the main person who was instrumental in getting through the transaction in question despite knowing it was sham one, therefore, there are strong chances that he may temper with the evidence with the kind of resources and connections embedded in Yes Bank, if released on bail at this stage. Though no doubt the entire case of the ED is based upon documentary evidence, but still meddling with the evidence considering his dominant position cannot be ruled out. With regard to the influencing of witnesses, considering the dominant and influential position of this accused in the transaction in question, as stated above, there are strong chances as well prima facie that he may influence the witnesses as also, if released on bail at this stage.

With regard to the flight risk, since the accused is involved in five different big ticket cases stated above, therefore, there may be strong chances of him fleeing from country in order to escape the law of the land, therefore, he can also be considered to be a flight risk at this stage. As a consequence, the accused fails with regard to all the parameters of Triple Test.

77. Further, no doubt this accused had not been formally arrested during the investigations of this case. Here it would be pertinent to refer to the following recent judgment of the Hon'ble Bombay High Court titled as Radha Kapoor Khanna Vs. Central Bureau of Investigation &Ors., Bindu Kapoor Vs. CBI & Others, Roshini Kapoor Vs. Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 9 11:59:21 Neutral Citation Number: 2022/DHC/005170 CBI &Others, Rajiv Anand Vs. State of Maharashtra, decided on 28.09.2021(supra), in a case pertaining to bail applications of certain family members of A-2, with regard to one RC lodged by CBI in DHFL case, it was held in para 16 by the Hon'ble Bombay High Court as under :

16. In any case, considering the three anterior stages, before converting a suspect to a convict, which involved a state of actual interrogation when an accused is taken in police custody, followed by the stage of judicial custody, which ensure completion of investigation and collection of the material in form of the final report to be placed before the Magistrate / Competent Court, which is duty bound to ensure a fair trial. It is only upon the presentation of the charge-sheet, where the full material is compiled together, the gravity of the offence could be judged and, the possibility of conviction of an accused being surfaced on the basis of the material coming before the Court in a crystallized form, prompted the learned Special Judge to reject the application for bail. Dispensation of arrest at the stage of investigation need not continue throughout and in particular, when the offence made out against the Applicants has now clearly emerged in the charge-sheet as a grave economic offence and, the witnesses who will participate in the trial apparently surfacing, the Applicants do not deserve their release on bail.

The said judgment is squarely applicable to the facts of the present case. Therefore, considering the overall facts and circumstances of the present case, since the allegations against the applicant / Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 10 11:59:21 Neutral Citation Number: 2022/DHC/005170 accused are most grave and serious in nature, as a resultant no ground for his bail is made out at this stage. Consequently, the bail application of accused Rana Kapoor (A-2) is dismissed.

4. The learned Senior Advocate for the applicant in support of present bail application primarily submitted arguments on basis Satinder Kumar Antil V CBI, 2022 SCC Online SC 825. He argued that the applicant is entitled to bail solely on the ground that he has not been arrested during investigation and the Supreme Court has reiterated and re-affirmed that if an accused is not arrested consciously during investigation, he is entitled to bail on entering appearance before the court, pursuant to the filing of the charge sheet and the said proposition of law is equally applicable to a production/appearance of accused under sections 88, 170 and 204 of the Code. He further argued that the respondent had arrested the co-

accused Gautam Thapar on 03.08.2021 in the present case, however consciously deemed fit not to arrest the applicant and proceeded to file a prosecution complaint against the applicant without arrest.

4.1 The learned Senior Advocate further argued that the Supreme Court in Satinder Kumar Antil also clarified that the said proposition of law would also be squarely applicable to offences Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 11 11:59:21 Neutral Citation Number: 2022/DHC/005170 under Special statues such as PMLA, despite the twin rigors under Section 45 of PMLA, 2002 and there is no need for further arrest at the instance of the court, if the accused is not arrested during investigation. The case of the applicant falls only in Category C as stated in Satinder Kumar Antil and not in Category D as stated by the Special Counsel for the respondent. He further argued that the word custody in the context of bail refers to custody in the "same case" and can by no stretch of imagination be perceived as "custody in other case(s)" on behalf of the respondent.

4.2 The learned Senior Advocate also controverted arguments submitted on behalf the respondent the applicant was not arrested during investigation in the present case as he was already in custody in another case. The applicant is on bail in other pending cases in which he was not arrested by the respondent during investigation.

The learned Senior Advocate for the applicant referred para no 65 of Satinder Kumar Antil.

5. The learned Senior Advocate also argued that the applicant has fully cooperated during investigation. The applicant got recorded his statement under section 50 of the PMLA on three occasions while he Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 12 11:59:21 Neutral Citation Number: 2022/DHC/005170 was in judicial custody in Taloja Jail in another cases. He controverted oral submissions made on behalf of the respondent that the applicant has "not co-operated" in investigation and referred Santosh V State of Maharashtra, 2017 (9) SCC 714.

5.1 The learned Senior Advocate also advanced other miscellaneous arguments which are pendency of other cases or multiple FIRs is not a ground to deny bail; gravity of offence has to be considered on basis of severity of punishment; mere apprehension of tampering and influencing witnesses is not a ground to deny bail; the applicant is not a flight-risk; the applicant is entitled to get bail on ground of parity;

the applicant never surrendered before trial court and has appeared in pursuance of summons etc. The learned Senior Advocate argued that the applicant be released on bail.

6. The learned Special Counsel for the respondent argued at length and also submitted detailed written arguments. He argued that the applicant moved present application for grant of bail primarily urging that the applicant was not arrested by the respondent during investigation and the complaint was filed without his arrest as such the applicant is entitled to bail in view of the section 170 of the Code Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 13 11:59:21 Neutral Citation Number: 2022/DHC/005170 and law laid down in Satinder Kumar Antil but the applicant has placed a misconceived reliance over Satinder Kumar Antil wherein it was held that bail of an accused on his appearance in Court in case relating to offence punishable under Special Acts containing stringent provisions for bail (like Section 45 of the PMLA in the present case) even though an accused was not arrested during investigation and had cooperated with investigation, shall be decided on merits besides compliance of section 45 of the PMLA.

6.1 The learned Special Counsel further argued that courts were giving wrong interpretation of section 170 of the Code by insisting that an accused shall be brought in custody while submission of charge sheet/prosecution complaint irrespective of the fact that whether such accused was not arrested during investigation or had been released on bail during investigation. The Supreme Court in Siddharth V State of UP, (2022)1 SCC676 clarified that it is not necessary for the police to arrest the accused prior to filing of chargesheet nor could the Court direct that the accused be arrested and be produced before it at the time of filing of chargesheet.

Siddharth did not lay down any guidelines as to the bail of such an Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 14 11:59:21 Neutral Citation Number: 2022/DHC/005170 accused when he appears in Court. The guidelines to be followed with regard to the bail when an accused appears before the Court as per the provision of section 170 of the Code have been settled by Satinder Kumar Antil. The Supreme Court in Satinder Kumar Antil did not set aside its earlier guidelines laid down in order dated 07.10.2021 but reiterated those guidelines. The prevailing situation with regard to grant of bail not restricted only to Section 170 of the Code but the Supreme Court also discussed sections 87 and 88 of the Code.

6.2 The learned Special Counsel for the respondent also referred Bimal Kumar Jain V Directorate of Enforcement, Bail Application bearing no 2438/2022 decided on 13.09.2022 wherein it was observed that even going by the judgment in Satender Kumar Antil when an accused is produced before the court without arrest, it had powers to act under section 88 of the Code to take a bond for appearance and that power has not been extinguished. The applicant has misinterpreted para 36 of Satiner Kumar Antil as the Supreme Court neither held that mandatorily accused has to be released on bail as per the provision section 170 of the Code nor held that the earlier Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 15 11:59:21 Neutral Citation Number: 2022/DHC/005170 categorization of offences and the guidelines regarding grant of bail in such a

situation shall not apply. He also argued that section 170 of the Code and the guidelines for grant of bail in Satinder Kumar Antil do not apply to an accused who is already in custody since it applies only in cases where an accused is not arrested by the investigating agency and the charge sheet is filed without his arrest.

6.3 The learned Special Counsel for the respondent further argued that the applicant has misinterpreted para no. 65 of Satinder Kumar Antil. The Supreme Court was conscious of the fact that the objective behind the Special Act and the rigors imposed therein make it extremely difficult to grant bail.

6.4 The learned Special Counsel for the respondent further argued that the Supreme Court desired that even in cases of Special Act when the accused is not in custody when the charge sheet/prosecution complaint is filed, the Court should not order the arrest of an accused prior to taking charge sheet on record, since it would be against the interpretation of Section 170 of the Code and this was only with regards to the appearance of an accused at the time of filing of charge sheet/prosecution complaint. He further argued that once the accused Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 16 11:59:21 Neutral Citation Number: 2022/DHC/005170 had put his appearance in court then bail has to be decided as per the laid down guidelines and it was not hold that the Court shall not follow the guidelines for grant of bail with regards to accused covered under Category C which is that the bail shall be decided on merits besides satisfying the conditions for grant of bail as mentioned in the Special Act.

6.5 The Special Counsel further argued that the interpretation of the applicant is incorrect also for the reason that while in cases covered under Category B and D, the bail application of accused has to be decided on merits, however, if the interpretation of the applicant is taken with regards to cases covered under Special Act i.e. Category C (containing additional stringent conditions for grant of bail), the accused shall be released on bail on his appearance, like in Category A which is for grant of bail in non-serious offences. This could have neither the intention of either the Legislature or the Supreme Court.

6.6 The Special Counsel for the respondent also argued at length that present bail application be decided on merit.

7. It is reflecting from record that CBI registered FIR bearing RC No.2232021A0005 under sections 120 B and 406, 420, 468, 471 IPC Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 17 11:59:21 Neutral Citation Number: 2022/DHC/005170 at P.S AC-V, Delhi on basis of complaint received from Ashish Vinod Joshi, Chief Vigilance Officer, Yes Bank Limited. Thereafter respondent filed CC No. ECIR/11/HIU 2021 dated 15.06.2021 under sections 44 and 45 PMLA for commission of offence of money laundering as defined under sections 3 and 4 of PMLA which is stated to be pending in the Court of Special Judge, PMLA, Rouse Avenue Courts. The applicant was not named as accused in FIR registered by CBI but interrogated by the respondent/ED and his three statements were recorded under section 50 of the PMLA. The applicant was not arrested during

investigation. The concerned trial court vide order dated 09.10.2021 acting on the Complaint took cognizance of the offence under sections 3 and 4 PMLA and summoned 21 persons /entities including the applicant to stand trial.

The applicant was in custody at that time in Taloja Central Jail, Mumbai in any other case. The co-accused Gautam Thapar was taken into custody during investigation on 03.08.2021 who filed a bail application under section 439 of the Code read with sections 45/46(1)/65 PMLA before Special Court which was dismissed vide order dated 30.10.2021. Thereafter co-accused Gautam Thapar filed a Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 18 11:59:21 Neutral Citation Number: 2022/DHC/005170 bail application bearing no 4185/2021 which was dismissed vide order dated 02.03.2022. The applicant on 09.11.2021 filed an application for grant of bail under section 439 of the Code read with sections 45, 46(1) and 65 PMLA on grounds that he was not arrested during investigation and was available during investigation and has extended full cooperation in investigation besides other grounds. The applicant was produced before the special court/trial court on 04.01.2022. The bail application filed by the applicant was dismissed by the court of Sh. Sanjeev Aggarwal, Special Judge (PC Act)(CBI)-

02 Rouse Avenue District Court, New Delhi vide common order dated 20.01.2022 but granted bail to all other individuals including the seven ex-senior YBL officials. The applicant was taken into custody accordingly.

8. The issue which needs judicial consideration is pertaining to applicability and interpretation of Satinder Singh Antil. As per applicant he is entitled to the bail as he was not arrested during investigation consciously and cooperated in the investigation and the charge sheet was filed without arrest and when his bail application was dismissed by the Special Judge, CBI, the applicant was taken Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 19 11:59:21 Neutral Citation Number: 2022/DHC/005170 into custody. The applicant relied on para no 65 of the Satinder Kumar Antil. The respondent case is based on the contention that bail application is required to be decided on merit and para no 65 of Satinder Kumar Antil is misinterpreted by the applicant and applicant falls in category C as per decision.

9. The Supreme Court in Satinder Kumar Antil took note of the continuous supply of cases seeking bail after filing of the final report on a wrong interpretation of Section 170 of the Code and an endeavor was made to categorize the types of offenses to be used as guidelines for the future. The Supreme Court in Siddharth V State of UP, (2022)1 SCC676 clarified that it is not necessary for the police to arrest the accused prior to filing of chargesheet nor could the Court direct that the accused be arrested and be produced before it at the time of filing of chargesheet.

9.1 The Supreme Court in Satinder Kumar Antil has laid down guidelines and categorised offences as under:-

Categories/Types of Offences A) Offences punishable with imprisonment of 7 years or less not falling in category B & D. B) Offences punishable with death, imprisonment for life, or imprisonment for more than 7 years.

Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 20 11:59:21 Neutral Citation Number: 2022/DHC/005170 C) Offences punishable under Special Acts containing stringent provisions for bail like NDPS (S.37), PMLA (S.45), UAPA (S.43D(5), Companies Act, 212(6), etc. D) Economic offences not covered by Special Acts.

9.2 The Supreme Court also laid down requisite conditions:-

- 1) Not arrested during investigation.
- 2) Cooperated throughout in the investigation including appearing before Investigating Officer whenever called.

(No need to forward such an accused along with the chargesheet (Siddharth v. State of UP, 2021 SCC OnLine SC 615) 9.3 The Supreme Court further laid down as under:- CATEGORY A After filing of chargesheet/complaint taking of cognizance

- a) Ordinary summons at the 1st instance/including permitting appearance through Lawyer.
- b) If such an accused does not appear despite service of summons, then Bailable Warrant for physical appearance may be issued.
- c) NBW on failure to appear despite issuance of Bailable Warrant.
- d) NBW may be cancelled or converted into a Bailable Warrant/Summons without insisting physical appearance of accused, if such an application is moved on behalf of the accused before execution of the NBW on an undertaking of the accused to appear physically on the next date/s of hearing.
- e) Bail applications of such accused on appearance may be decided w/o the accused being taken in physical custody or by granting interim bail till the bail application is decided.

Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 21 11:59:21 Neutral Citation Number: 2022/DHC/005170 CATEGORY B/D On appearance of the accused in Court pursuant to process issued bail application to be decided on merits.

CATEGORY C Same as Category B & D with the additional condition of compliance of the provisions of Bail under NDPS S.37, 45 PMLA, 212(6) Companies Act 43 d(5) of UAPA, POSCO etc. Needless to say that the category A deals with both police cases and complaint cases.

9.4 It was further directed as under:-

The trial Courts and the High Courts will keep in mind the aforesaid guidelines while considering bail applications. The caveat which has been put by learned ASG is that where the accused have not cooperated in the investigation nor appeared before the Investigating Officers, nor answered summons when the Court feels that judicial custody of the accused is necessary for the completion of the trial, where further investigation including a possible recovery is needed, the aforesaid approach cannot give them benefit, something we agree with.

We may also notice an aspect submitted by Mr. Luthra that while issuing notice to consider bail, the trial Court is not precluded from granting interim bail taking into consideration the conduct of the accused during the investigation which has not warranted arrest. On this aspect also we would give our imprimatur and naturally the bail application to be ultimately considered, would be guided by the statutory provisions.

The suggestions of learned ASG which we have adopted have categorized a separate set of offences as "economic Offences" not covered by the special Acts. In this behalf, suffice to say on the submission of Mr. Luthra that this Court in Sanjay Chandra v. CBI, (2012) 1 SCC 40 has Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 22 11:59:21 Neutral Citation Number: 2022/DHC/005170 observed in para 39 that in determining whether to grant bail both aspects have to be taken into account:

- a) Seriousness of the charge and
- b) Severity of punishment.

Thus, it is not as if economic offences are completely taken out of the aforesaid guidelines but do form a different nature of offences and thus the seriousness of the charge has to be taken into account but simultaneously, the severity of the punishment imposed by the statute would also be a factor.

9.5 The Supreme Court also dealt with scope of section 170 of the Code. Section 170 of the Code reads as under:-

170. Cases to be sent to Magistrate when evidence is sufficient.--(1) If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial, or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.

9.5.1 The Supreme Court in relation and interpretation of section 170 of the Code observed as under:-

36. The scope and ambit of Section 170 has already been dealt with by this Court in *Siddharth v. State of U.P.*, (2022) 1 SCC 676. This is a power which is to be exercised by the court after the completion of the investigation by the agency concerned. Therefore, this is a procedural Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 23 11:59:21 Neutral Citation Number: 2022/DHC/005170 compliance from the point of view of the court alone, and thus the investigating agency has got a limited role to play. In a case where the prosecution does not require custody of the accused, there is no need for an arrest when a case is sent to the magistrate under Section 170 of the Code. There is not even a need for filing a bail application, as the accused is merely forwarded to the court for the framing of charges and issuance of process for trial. If the court is of the view that there is no need for any remand, then the court can fall back upon Section 88 of the Code and complete the formalities required to secure the presence of the accused for the commencement of the trial. Of course, there may be a situation where a remand may be required, it is only in such cases that the accused will have to be heard. Therefore, in such a situation, an opportunity will have to be given to the accused persons, if the court is of the prima facie view that the remand would be required. We make it clear that we have not said anything on the cases in which the accused persons are already in custody, for which, the bail application has to be decided on its own merits. Suffice it to state that for due compliance of Section 170 of the Code, there is no need for filing of a bail application.

It is pertinent to mention that the learned Senior Counsel for the respondent stated that it is not necessary for the court to grant bail.as per section 170 of the code 9.6 The Supreme Court in respect of offences falling in Category C observed as under:-

64. Now we shall come to category (C). We do not wish to deal with individual enactments as each special Act has got an objective behind it, followed by the rigor imposed. The general principle governing delay would apply to these Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 24 11:59:21 Neutral Citation Number: 2022/DHC/005170 categories also. To make it clear, the provision contained in Section 436A of the Code would apply to the Special Acts also in the absence of any specific provision. For example, the rigor as provided under Section 37 of the NDPS Act would not come in the way in such a case as we are dealing with the liberty of a person. We do feel that more the rigor, the quicker the adjudication ought to be. After all, in these types of cases number of witnesses would be very less and there may not be any justification for prolonging the trial. Perhaps there is a need to comply with the directions of this Court to expedite the process and also a stricter compliance of Section 309 of the Code.

9.7 The Supreme Court further clarified interpretation of section 170 of the Code as under:-

65. We may clarify on one aspect which is on the interpretation of Section 170 of the Code. Our discussion made for the other offences would apply to these cases also. To clarify this position, we may hold that if an accused is already under incarceration, then the same would continue, and

therefore, it is needless to say that the provision of the Special Act would get applied thereafter. It is only in a case where the accused is either not arrested consciously by the prosecution or arrested and enlarged on bail, there is no need for further arrest at the instance of the court. Similarly, we would also add that the existence of a parimateria or a similar provision like Section 167(2) of the Code available under the Special Act would have the same effect entitling the accused for a default bail. Even here the court will have to consider the satisfaction under Section 440 of the Code.

Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 25 11:59:21 Neutral Citation Number: 2022/DHC/005170

10. The applicant is implicated in PMLA which was enacted to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto. Section 45 provides that offences punishable under PMLA are cognizable and non-bailable also provides stringent conditions in grant of bail. It reads as under-

45. Offences to be cognizable and non-bailable.--(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence under this Act shall be released on bail or on his own bond unless--

(i) The Public Prosecutor has been given a opportunity to oppose the application for such release; and

(ii) Where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees] may be released on bail, if the Special Court so directs.

10.1 As per Satinder Kumar Antil, Offences punishable under Special Acts containing stringent provisions for bail like NDPS (S.37), PMLA (S.45), UAPA (S.43D(5), Companies Act, 212(6), etc. fall in category C. The bail applications for offences falling in Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 26 11:59:21 Neutral Citation Number: 2022/DHC/005170 Category C are required to be decided on merit besides consideration of additional condition of compliance of the provisions of Bail under NDPS S.37, 45 PMLA, 212(6) Companies Act 43d(5) of UAPA, POSCO etc.

11. The applicant was not implicated in FIR bearing RC No.2232021A0005 registered by CBI. The applicant was implicated in present criminal complaint filed by the respondent/ED and arrayed as accused no 2. The investigating officer consciously did not arrest the applicant. The applicant

participated in investigation as his three statements under section 50 PMLA were recorded. The respondent also did not allege that the applicant neither participated nor cooperated in investigation. The concerned Special Court after taking cognizance on present criminal complaint ordered for summoning of the accused persons including the applicant. The investigating officer even after filing of present complaint did not apply for custody of the applicant. The co-accused Gautam Thapar was arrested consciously by the investigating officer during investigation and was denied bail by the Special Court and High Court and as such the applicant is standing on different footing from co-accused Gautam Thapar. The Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 27 11:59:21 Neutral Citation Number: 2022/DHC/005170 applicant was taken into custody due to dismissal of bail application vide order dated 20.01.2022 passed by the court of Sh. Sanjeev Aggarwal, Special Judge (PC Act)(CBI)-02 Rouse Avenue District Court, New Delhi. The applicant primarily not seeking bail on merit but on basis of observation made by the Supreme Court in para no 65 of Satinder Kumar Antil decision and as such applicant is not required to pass the test of section 45 PMLA. The conditions as per section 45 PMLA would be applicable, had the applicant filed an application either under section 439 of the Code after arrest during investigation or under section 438 of the Code apprehending his arrest during investigation. As mentioned in present criminal complaint filed by the respondent, the applicant was not arrested during investigation by the investigating agency. There is legal force in argument advanced by the learned Senior Counsel of the applicant that applicant is entitled to bail in view of observations/legal proposition as laid down by the Supreme Court in Satinder Kumar Antil. It is not mandate of section 170 of the Code that if the accused is not taken into custody or arrested during investigation can be arrested or taken into custody after appearance in court post Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 28 11:59:21 Neutral Citation Number: 2022/DHC/005170 summoning order particularly when neither investigation agency nor prosecution agency sought arrest of accused.

12. The arguments advanced by the learned Special Counsel for the respondent that the applicant has misinterpreted para no 65 of Satinder Kumar Antil is misplaced. There is no force in argument advanced by the learned Special Counsel for the respondent that the applicant before grant of bail required to pass test of 45 of PMLA.

The position would have been different, had the applicant arrested during investigation. The investigating agency as mentioned hereinabove consciously preferred not to arrest the applicant during investigation or post filing of charge sheet. The arguments advanced and case law relied on by the Special Counsel for the respondent are considered in right perspective to the given facts and circumstances but they do not provide much legal help to the respondent in opposing present bail application.

13. In view of above discussion the present bail application is allowed and applicant is admitted to bail on furnishing a personal bond in the sum of Rs.10,00,000/- (Rupees Ten Lakhs Only) with Signature Not Verified Digitally Signed By:JITENDRA Signing Date:28.11.2022 BAIL APPLN. 559/2022 RANA KAPOOR V DIRECTORATE OF ENFORCEMENT Page 29 11:59:21 Neutral

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- i. That the applicant shall not influence any witness;
- ii. The applicant shall provide his mobile phone number to the concerned Investigating Officer (IO) immediately after release which shall be kept in working condition at all times;
- iii. The applicant shall not indulge in any criminal activity;
- iv. The applicant shall not leave country without prior permission of the Trial/Special Court.

14. The present bail application alongwith pending applications, if any, stands disposed of.

SUDHIR KUMAR JAIN (JUDGE) NOVEMBER 25, 2022 N/SD Signature Not Verified Digitally
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